Supreme Court, U.S.
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No. 02-534

In The

Supreme Court of the United States

UNITED STATES OF AMERICA *ex rel.*
JEFFREY SCOTT CLAUSEN,

Petitioner,

v.

LABORATORY CORPORATION OF AMERICA, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should the Court grant certiorari to review whether Rule 9(b) applies to claims for which proof of fraudulent intent is not required when that question is not presented on the facts of this case?

2. Should the Court grant certiorari to review whether Rule 9(b) applies to cases brought under the False Claims Act, where, consistent with this Court's recognition that the False Claims Act is an "anti-fraud" statute, Rule 9(b) has routinely been applied by every circuit to decide the question?

RULE 29.6 STATEMENT

Respondent Laboratory Corporation of America ("LabCorp") is a wholly-owned subsidiary of Laboratory Corporation of America Holdings ("LabCorp Holdings"), a publicly held corporation. LabCorp Holdings has no parent corporation, and no publicly held company owns 10% or more of LabCorp Holdings' stock.

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BRIEF IN OPPOSITION

Respondent, Laboratory Corporation of America ("LabCorp"), respectfully requests that the Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Eleventh Circuit in this case.

INTRODUCTION

Petitioner requests this Court to grant certiorari to review an unremarkable decision of the Eleventh Circuit in this case which, consistent with what petitioner acknowledges is the "national trend of courts of appeals' decisions," Pet. 5, held that Federal Rule 9(b) applies to a claim brought under the False Claims Act, 31 U.S.C. §§ 3729-3733. The petition should be denied because this case does not fairly raise the questions presented and because the Eleventh Circuit's decision is decidedly not in conflict (and is in fact consistent) with the decisions of other courts of appeals and does not otherwise present any compelling basis for this Court's review.

In his second amended complaint, petitioner alleged that LabCorp had engaged in a series of nationwide schemes to submit false claims to the United States government. Given the nature of these claims as petitioner framed them, the Eleventh Circuit conducted a routine examination under Rule 9(b) and affirmed the district court's dismissal of petitioner's second amended complaint. This was entirely correct because petitioner was unable to allege even a single specific instance of the submission of a false claim to the United States government.

First and foremost, this case does not, on its facts, present an appropriate vehicle for the broader review that petitioner seeks – that Rule 9(b)'s particularity requirements should be relaxed or not applied at all because the False Claims Act does not require proof of a specific intent to defraud. That issue simply is not presented in this case, where the petitioner's claims relied upon allegations of a purposeful scheme to defraud the United States government. *See* Pet. App. 3 ("In his complaint, Clausen alleges that LabCorp engaged in a multi-faceted, decade-long campaign to defraud the Government as a result of its testing services[.]").

Moreover, in affirming the District Court's dismissal of the second amended complaint, the Eleventh Circuit has not plowed any new ground. To the contrary, and as petitioner acknowledges, the Eleventh Circuit's decision is absolutely consistent with the trend among the circuits; indeed, no fewer than six circuits now similarly apply Rule 9(b) in precisely the same circumstances. As a result, the Eleventh Circuit has not decided an "important question of federal law" in a way that "conflicts with relevant decisions of this Court" or of the courts of appeal. *See* S. Ct. Rule 10. Instead, as its opinion demonstrates, the Eleventh Circuit carefully considered decisions of its sister circuits, this Court's own recognition that the False Claims Act is, at bottom, an "anti-fraud" statute, and the nature of the particular allegations made in the underlying complaints in this case.

For each of these reasons, the petition should be denied.

COUNTERSTATEMENT

A. Rule 9(b) and the False Claims Act.

The requirements of Rule 9(b) are straightforward, and their application to *qui tam* complaints, like the one in this case, is now routine. Rule 9(b) requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). The rule is generally understood to require a plaintiff to allege the "who, what, when, where, and how" of the alleged fraud. *See, e.g., Cooper v. Blue Cross & Blue Shield of Fla.,* 19 F.3d 562, 568 (11th Cir. 1994) (per curiam).

In his second amended complaint, petitioner alleged that LabCorp concocted a pervasive scheme to submit false claims to the government, in violation of sections 3729(a)(1) and (1)(2) of the False Claims Act. Those provisions apply to any person who: "(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government *** a false or fraudulent claim for payment or approval; [or] (2) knowingly makes, uses or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the government." 31 U.S.C. § 3729(a)(1)-(2).

The applicability of Rule 9(b) in the context of *qui tam* complaints is well settled. In addition to the Eleventh Circuit, at least five other circuits have held that the rule applies in such circumstances. *See, e.g., Bly-Magee v. California,* 236 F.3d 1014, 1018 (9th Cir. 2001); *United States ex rel. Russell v. Epic Healthcare Mgmt. Group,* 193 F.3d 304, 308 (5th Cir. 1999); *Harrison v. Westinghouse Savannah River Co.,* 176 F.3d 776, 783-84 (4th Cir. 1999); *United States ex rel. LaCorte v. SmithKline Beecham*

Clinical Labs, Inc., 149 F.3d 227, 234 (3rd Cir. 1998); and *United States ex rel. Schwedt v. Planning Research Group*, 59 F.3d 196 (D.C. Cir. 1995). *See also Cooper, supra*, 19 F.3d at 568. *See generally* John T. Boese, *Civil False Claims and Qui Tam Actions* § 5.04 (2d ed. 2000 & Supp. 2002) (compiling cases).

B. Factual Background.

LabCorp is a clinical laboratory that offers a broad range of laboratory tests used by the medical profession in the diagnosis, monitoring, and treatment of diseases and other clinical conditions. Through a nationwide network of laboratories, LabCorp has processed literally tens of millions of tests at the request of treating physicians over the last decade, the approximate time period of petitioner's complaint.

Petitioner Jeffrey Scott Clausen, a former employee of SmithKline Beecham Clinical Laboratories, a LabCorp competitor, filed his original *qui tam* complaint under seal in this action on July 28, 1997. That initial complaint alleged that LabCorp violated the federal False Claims Act by submitting false claims for payment to, *inter alia*, Medicare, Medicaid, and the Civilian Health and Medical Program of the United States ("CHAMPUS"). After two years of investigation, the United States declined to intervene in the action. Thereafter, by Order dated January 21, 2000, the District Court unsealed the complaint.

Petitioner filed his first amended complaint on May 10, 2000. LabCorp moved to dismiss the first amended complaint pursuant to Rule 9(b) because Clausen failed to provide any detail or substantiation for his claims of fraud

under the FCA. The District Court granted LabCorp's motion to dismiss while granting Clausen leave to amend. On December 29, 2000, Petitioner filed a second amended complaint. Because the second amended complaint did nothing but *assume* that false claims must have been filed within several days of testing, LabCorp again moved to dismiss under Rule 9(b). LabCorp argued that the second amended complaint was deficient because Clausen did nothing more than repeat his broad allegations of fraud with the single addition of alleging, upon information and belief, that LabCorp submitted false claims to the government sometime "on or within a few days following" the alleged dates of service. Like the preceding first amended complaint, the second amended complaint did not identify a single specific claim that had been submitted to the United States or explain how any such claims were false, let alone identify the dates on which these "false claims" were supposedly presented to the government, or by whom.

On May 16, 2001, the District Court dismissed the second amended complaint, this time with prejudice, for failing once again to comply with Rule 9(b):

> [Clausen] has not . . . identified a single fraudulent claim by date filed, amount or claim number that was actually submitted to the government. Identifying the type of claim form used and stating that a claim was filed on the day of service or a few days thereafter is not sufficient to identify the fraudulent claims with sufficient particularity to comply with Rule 9(b) in the context of this case. Performing unnecessary tests is not a violation of the False Claims Act. The particularity requirement of Rule 9 is a nullity if Plaintiff gets

> a ticket to the discovery process without identifying a single false claim by amount. "In this case, [Clausen] has merely described the allegedly illegal contracts and arrangements without identifying any person, place or time when an actual false claim or other illegal activity occurred. He alleges at best the existence of a general scheme or methodology by which defendants could have violated the False Claims Act. This is simply insufficient under Rule 9(b)."

Petitioner's appeal to the Eleventh Circuit followed.

In a careful and comprehensive opinion, a divided panel of the Eleventh Circuit affirmed the District Court. Pet. App. 1-36. The Court of Appeals first rejected Clausen's argument that Rule 9(b) should not be applied in the context of a *qui tam* complaint, agreeing with the decisions of its sister circuits and a number of district courts, as well as with a prior decision in the Eleventh Circuit, in which Rule 9(b) had expressly been held to apply to False Claims Act cases. *Id.* 14-18. While Judge Barkett, in dissent, disagreed with the outcome, she did not disagree with the majority's application of Rule 9(b) to the facts of the case. *See* Pet. App. 30-36.

The Court of Appeals measured Clausen's second amended complaint against Rule 9(b)'s standard, and reached the conclusion that, based upon its review of the pleadings, Clausen's amended allegations came up short. Pet. App. 19-29. The Court of Appeals conceded that while Clausen may have alleged a fraudulent scheme with sufficient particularity, he had failed to provide any information regarding the submission of any *actual* – and not merely theoretically possible – false claims to the government:

> Without the *presentment* of such a claim, while the practices of an entity that provides services to the Government may be unwise or improper, there is simply no actionable damage to the public fisc as required under the False Claims Act. *Harrison,* 176 F.3d at 785 ("The False Claims Act at least requires the presence of a claim – a call upon the government fisc – for liability to attach."). The submission of a claim is thus not, as Clausen argued, a "ministerial act," but the sine qua non of a False Claims Act violation.

Id. 22 (emphasis added).

Clausen petitioned for rehearing and rehearing en banc of the Eleventh Circuit's decision. The Court of Appeals denied the petition without dissent. *Id.* 37-38.

REASONS FOR DENYING THE WRIT

I. THE QUESTION PRESENTED BY THE PETITION IS NOT FAIRLY RAISED BY THIS CASE.

This case does not present an appropriate vehicle for considering the applicability of Rule 9(b) generally to *qui tam* complaints brought under the False Claims Act because that question was simply not an issue in this case. The second amended complaint filed by Clausen, like each of its prior iterations, plainly sounded in fraud. Clausen broadly alleged a decade-long "scheme" by LabCorp, through a variety of methods including self-referrals, duplicative testing, excess charges and illegal kickbacks, to "submit false claims to the United States . . . on a nationwide basis." Second Amended Compl. ¶¶11, 25. Clausen further alleged, in connection with each of these

alleged "schemes," that "claims for payment for the *fraudulently billed* procedures were submitted electronically on the dates of services . . . or within a few days thereafter." *Id.*, ¶45-47 (emphasis added.)

Clausen's complaint is thus not the stuff of negligence, but is instead based upon allegations of intentional fraudulent misconduct. As a result, whatever the broader policy considerations advanced by Clausen in support of his petition, the Court should not grant certiorari here, where those policies could not conceivably have come into play. *See, e.g., Rogers v. United States,* 522 U.S. 252, 259 (1998) (dismissing writ of certiorari as improvidently granted where "the record does not fairly present the question that we granted certiorari to address.").

At most, petitioner challenges the Eleventh Circuit's otherwise routine application of Rule 9(b) to the allegations of fraud set forth in his second amended complaint. Far from presenting any compelling basis warranting review in this Court, an asserted misapplication of the rule to the facts of this case is not an appropriate basis for certiorari. *See* S. Ct. Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). This Court should decline to review the question presented by this petition until, if at all, it is presented in a case in which it was fully and properly considered below.

II. THE COURT SHOULD DECLINE TO GRANT REVIEW OF THIS CASE BECAUSE THIS CASE PRESENTS NO CONFLICT WITH ANY DECISION OF THIS COURT OR WITH THE DECISION OF ANY OTHER CIRCUIT COURT.

The Eleventh Circuit applied the correct standard in assessing Clausen's claims under Rule 9(b). Its decision to apply 9(b) in the context of a False Claims Act case was consistent not only with established precedent in its own court, *see Cooper, supra,* 19 F.3d at 568, but also with the decisions of no fewer than five other circuit courts of appeal. *See Bly-Magee v. California,* 236 F.3d 1014, 1018 (9th Cir. 2001); *United States ex rel. Russell v. Epic Healthcare Mgmt. Group,* 193 F.3d 304, 308 (5th Cir. 1999); *Harrison v. Westinghouse Savannah River Co.,* 176 F.3d 776, 783-84 (4th Cir. 1999); *United States ex rel. LaCorte v. SmithKline Beecham Clinical Labs, Inc.,* 149 F.3d 227, 234 (3rd Cir. 1998); and *United States ex rel. Schwedt v. Planning Research Group,* 59 F.3d 196 (D.C. Cir. 1995). *See also Cooper v. Blue Cross & Blue Shield of Fla.,* 19 F.3d 562, 568 (11th Cir. 1994) (per curiam).

Faced with such consistent application of Rule 9(b) principles, petitioner tries to gin up a review-worthy controversy by claiming that the various circuit court decisions over the past decade bring those courts into conflict with decisions of this Court. Pet. 5, 18-19. Contrary to Clausen's assertions, the Eleventh Circuit's decision in this case and the decisions of its various sister courts to apply Rule 9(b) in False Claims Act cases do not constitute an improper expansion of 9(b) contrary to Congress' intent or the decisions of this Court.

The two cases cited by petitioner for this proposition – *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506 (2002) and *Leatherman v. Tarrant County Narcotics Intelligence and*

Coordination Unit, 507 U.S. 163 (1993) – lend no support to the petition. In *Leatherman,* the Court was faced with the question of whether a federal court could apply a "heightened pleading standard" in civil rights cases alleging municipal liability under 42 U.S.C. § 1983. The Court held that it could not:

> Rule 9(b) does impose a particularity requirement in two specific instances. It provides that "[I]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Thus, the Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983.

507 U.S. at 168. *Swierkiewicz* applied a similar rationale to reach the same conclusion in the context of Title VII. *Swierkiewicz,* 534 U.S. at 512 ("Just as Rule 9(b) makes no mention of municipal liability under [42 U.S.C. § 1983], neither does it refer to employment discrimination.").

Unlike Section 1983 and employment discrimination, Rule 9(b) does expressly contemplate application to the type of activity that is at the core of the False Claims Act – fraud. As this Court has itself recognized – both prior to and following Congress' overhaul of the False Claims Act in 1986 – the False Claims Act is an "anti-fraud" statute. *See, e.g., Vt. Agency of Natural Res. v. Stevens,* 529 U.S. 765, 781 (2000); *United States v. Neifert-White Co.,* 390 U.S. 228 (1968). As a result, Rule 9(b), by its terms, applies to claims brought under the statute.

The 1986 amendments to the False Claims Act do not alter this conclusion. The False Claims Act, as amended,

plainly continues to address complex schemes to defraud the government – as Clausen attempted to allege below and as to which Rule 9(b) unquestionably applies – in addition to false claims submitted in reckless disregard of the truth or falsity of the submission. More to the point, given petitioner's reliance on the absence of any requirement to prove specific intent to defraud under the amended act, Rule 9(b) by its terms applies to "all averments of fraud *or* mistake." Fed. R. Civ. P. 9(b) (emphasis added). Thus, even if petitioner's underlying claims had not asserted an intentional scheme (which they did), even unintentional errors in submissions (albeit arguably inadequate to establish liability under the False Claims Act) must be pled with particularity.

Nor is application of Rule 9(b)'s particularity requirements inconsistent with expressed Congressional intent. The 1986 amendments to the False Claims Act were intended to encourage relators with actual knowledge of fraud or false claims against the government to come forward without fear of retaliation. ("The proposed legislation seeks not only to provide the Government's law enforcers with more effective tools, but to encourage any individual knowing of Government fraud to bring that information forward.") S. Rep. No. 99-345, at 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267. It did so through a number of new measures, among them enactment of specific provisions to protect relators against possible retaliation. *Id.* at 2, 34, *reprinted in* 1986 U.S.C.C.A.N. 5267, 5299.

The amendments also broadened the definition of "knowing" conduct to address the submissions of both false and fraudulent claims and to capture not only purposeful fraud, as Clausen alleged, but also "ostrich-like" conduct

by corporate managers who might otherwise undertake no effort to determine the accuracy of the claims submitted. *See, e.g.*, S. Rep. 99-345, at 7, 14, *reprinted in* 1986 U.S.C.C.A.N. 5272, 5279. There is nothing in the legislative history, however, that supports the notion that Congress intended to lower the bar to such an extent as to permit, let alone encourage, corporate outsiders like the petitioner here to use their general knowledge of an industry to craft a complaint based on pure speculation, in the hopes that, through discovery, something might turn up.

Rule 9(b) continues to strike a necessary balance between Congress' desire to encourage relators having actual knowledge of false or fraudulent conduct to come forward and the recognized need to provide continuing protection to defendants against strike suits and otherwise frivolous claims. Recognition of this need in the context of False Claims Act litigation has been a consistent thread in the decisions of the various courts of appeal, and is not in any way at odds with the decisions of this Court.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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